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Louisiana Law Review

Volume 36 | Number 4
Summer 1976

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Repository Citation

Marc J. Hershman and Dowell R. Fontenot, *Local Regulation of Pipeline Sitings and the Doctrines of Federal Preemption and Supremacy*, 36 La. L. Rev. (1976)
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LOCAL REGULATION OF PIPELINE SITINGS AND THE DOCTRINES OF FEDERAL PREEMPTION AND SUPREMACY

Marc J. Hershman and Dowell R. Fontenot***

Pipelines are necessary elements of almost all operations to recover oil and gas, and recent federal government initiatives encouraging greater domestic oil and gas production, especially in offshore areas,[1] increase the likelihood of further pipeline construction. The desire of oil and gas producing states to retain their resources for intrastate use to favor local consumption and to attract industrial development has spurred the construction of new intrastate lines.[2] The need to replace worn pipelines, shifts in destination points for the oil or gas produced, the discovery of new land-based fields, and the reworking of old fields all contribute to the demand for additional pipeline services.

Amid this new pipeline construction, the interest of local government in the siting decision often is ignored. Pipeline

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1. Outer Continental Shelf lease sales are planned in the near future off the coasts of Alaska, Southern California, Maryland, Texas, Louisiana, Mississippi, Alabama, and Florida. Coastal Zone Management Newsletter, Vol. 7, No. 4, January 28, 1976, at 4-6. Congress currently is considering S. 521, 94th Congress, 1st Session (1975) and H.R. 6218, 94th Cong., 1st Sess. (1975), amending the Outer Continental Shelf Lands Act, and S. 586, 94th Cong., 1st Sess. (1975) and H.R. 3981, 94th Cong., 1st Sess. (1975), amending the Coastal Zone Management Act, both designed to encourage state energy resource development by providing federal funds to offset any resulting environmental impacts. *See also* Project Independence: A Summary, Federal Energy Administration, U.S. Gov't Printing Office, Stk. No. 4118-00028 (Nov. 1974).

2. Interview with Ory Poret, Assistant Register of State Lands, in Baton Rouge, La., April 1, 1976. The amount of intrastate construction, however, is quite small compared to the continuing growth of interstate lines. Interview with Donald Bonnecarrere, Administrator of Pipelines, Dept. of Conservation for the State of La., in Baton Rouge, La., April 1, 1976.

location may affect a community by spurring growth in unexpected or unsuitable areas and may affect the land itself, *e.g.*, the permanent changes in wetland water flow patterns often experienced when pipelines cut through bays and marshes. Pipeline expense and immobility once laid require forecasting potential impacts from the construction. Pipelines often attract refineries, storage facilities, tank farms, pumping stations, and other ancillary facilities.[3] The demand for roads and the provision of a variety of municipal services may increase, requiring capital budgeting lead time. Also, pipeline safety requirements may prohibit the construction of schools, roads or other municipal improvements in areas previously planned for such use. Abandoned pipelines raise special local concerns over safety, future maintenance, and future land use.[4] Thus the claims of local government for a voice in the pipeline decision-making process are likely to increase.

In the past, federal authorities have exercised the dominant role in pipeline regulation, apparently in recognition of the interstate character of these arteries of commerce. However, the legal problems encountered when local interests conflict with the desires of the pipeline company over appropriate pipeline routes need to be evaluated in light of the supremacy clause and the doctrine of federal preemption. This article addresses such problems after first developing the background of federal and state regulatory processes in skeletal form, then reviews the success and failure of local pipeline regulation in the case law. Pipeline cases that specifically address the preemption question and recent court developments interpreting the doctrine of preemption will be examined, followed by a consideration of possible courses of action for local governments.

FEDERAL OFFSHORE REGULATIONS

In 1953, Congress enacted the Submerged Lands Act,[5] which established the state jurisdictional claim to all submerged land within three miles from the shore.[6] In the same

3. *See* P. BALDWIN, ONSHORE PLANNING FOR OFFSHORE OIL 95-104 (1975).

4. At present there are no fully abandoned fields in Louisiana. *See* Note, 28 OKLA. L. REV. 902-12 (1975).

5. 43 U.S.C. §§ 1301-43 (1953).

6. Texas and Florida's Gulf Coast have boundaries three marine leagues from shore. United States v. States of La., etc., 363 U.S. 1, 121 (1960).

year the Outer Continental Shelf Lands Act[7] was passed, which establishes a federal regulatory program for the development of the seabed resources of the outer continental shelf (OCS). Under that act the Department of Interior has the duty to lease the submerged lands for energy development to fulfill the nation's "urgent need,"[8] and the duty to consider conservation and waste prevention. Accordingly, the Department has stated its objectives to be the orderly and timely development of the resources, the protection of the environment, and the receipt of fair market value.[9]

The leasing process is conducted by the Bureau of Land Management, an agency of the Department of Interior, and usually is begun after industry representatives have tested tracts[10] and requested that they be leased. Assuming approval,[11] the Bureau receives bids on the nominated tracts and then decides which bid, if any, to accept. If the Bureau awards a lease, the lessee may obtain from the Secretary a pipeline right-of-way[12] although it may be encumbered by numerous conditions.[13] An applicant for a right-of-way need not be a leaseholder. An independent pipeline company could apply, for example, if the purpose and desired route of the pipeline are stated in the application.[14] Additionally, an

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7. 43 U.S.C. §§ 1332-43 (1953).

8. 43 U.S.C. § 1337(c) (1953).

9. For interpretation of Departmental objectives, see D. KASH & J. WHITE, ENERGY UNDER THE OCEANS 101 (1973) [hereinafter cited at KASH & WHITE].

10. Exploratory permits are required by the U.S. Geological Survey. 43 U.S.C. § 1340 (1953).

11. Environmental, geologic, and economic evaluation of a tract sale must be considered by the Bureau of Land Management before any sale. *See* KASH & WHITE at 100-03.

12. 43 C.F.R. § 2883.0-3 (1970).

13. 43 U.S.C. § 1334(c) (1953); *see, e.g.*, Federal Power Comm'n, 15 U.S.C. § 717 (1938); 18 C.F.R. § 1.1 (1972) (regulation of rates and other elements of common carrier status); Interstate Commerce Comm'n, 49 U.S.C. §§ 1-27 (1958); 49 C.F.R. §§ 1.1-1.65 (1975) (rate and preference controls); Department of the Army & Coast Guard, 43 C.F.R. § 2883.0-3 (1970) (requirements for safety and navigational aid); Department of Transportation, 49 C.F.R. § 195.210 (1969) (restriction on placement and construction primarily for safety reasons).

14. 43 C.F.R. § 2883.2-1 (1970). Further, if the right-of-way applied for crosses mineral leases or rights-of-way other than his own, the applicant must submit with his application written consent of all lessees or right-of-way holders affected by his application, or a statement that all so affected have been given notice of his application by certified or registered mail and

applicant must indemnify the United States or its lessees or other right-of-way holders in the event of damage arising from the occupation and use of the area covered by the right-of-way.[15]

The Director of the Bureau may authorize pipeline construction, at the applicant's risk, before a right-of-way is granted, without prejudicing the Bureau's right to deny the application later.[16] Once granted, however, a right-of-way can exist indefinitely subject to forfeiture only if the purpose of the grant ceases to exist, if the use of the pipeline is permanently discontinued,[17] or if the grantee fails to provide proof of construction within five years of the grant.[18]

FEDERAL ONSHORE REGULATIONS

The focus of regulation shifts to the Federal Power Commission and the Interstate Commerce Commission once a pipeline enters a state's jurisdiction, usually three miles offshore.[19] As on the OCS,[20] these agencies have as their objectives the assurance of just and reasonable rates and the prevention of undue preference or advantage by common carriers.[21] Both agencies require the filing of rate schedules, and both have the power to correct unfair rates.[22]

Federal statutes grant condemnation power for acquiring rights-of-way for gas, but not oil, pipelines,[23] thus relegating the latter to reliance on state condemnation authority. The Secretary of Interior grants rights-of-way over federal land upon the condition that any pipeline crossing federal lands be a common carrier and that all petroleum products transported through the line be produced in conformity with state

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that such statements were accompanied by a map of the area affected. If the latter method of notice has been used, the application cannot be approved before fifteen days have passed from the date of service. 43 C.F.R. § 2234.5-3(c)(3) (1970).

15. 43 C.F.R. § 2883.1 (1970).

16. *Id.* § 2883.1(a)(2) (1970).

17. *Id.* § 2881.1 (1970).

18. *Id.* § 2883.2-3 (1970).

19. See exception mentioned in note 6, *supra.*

20. See text at note 9, *supra.*

21. 15 U.S.C. § 717(d)(a) (1938).

22. *Id.*

23. *Id.* § 717(f)(h) (1947). *See generally* Sperry, *Pipeline Expropriation Problems*, 17 INSTITUTE ON MINERAL LAW 83 (1971).

and federal laws.[24] Further, the Secretary or the agency head granting the right-of-way must attempt to comply with state standards for construction, operation and maintenance when these are more stringent than federal regulations.[25] Finally, the Secretary must deny any application for a route which would cross a withdrawn area.[26]

The Department of Transportation must approve right-of-way sites under the Natural Gas Pipeline Safety Act of 1968.[27] In approving the sites the Department of Transportation has two main concerns: first, selecting a path that avoids, as far as practicable, areas containing private dwellings, industrial buildings, or places of public assembly; second, assuring at least twelve additional inches of soil cover the pipeline if placement near one of the above listed areas is necessary.[28]

STATE REGULATION

The Submerged Lands Act of 1953 limits state regulation to onshore and to submerged lands within three miles of the coast.[29] Within the three-mile limit states have used their regulatory powers in a piecemeal fashion with numerous agencies exercising differing degrees of control.[30] Technological requirements or preferences of the industry and the availability of servitudes have usually determined the place-

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24. 30 U.S.C. § 185(a)(c)(2) (1973); 43 C.F.R. § 2881 (1970).

25. 30 U.S.C. § 185(u) (1973).

26. Withdrawal is the setting aside of public lands to maintain the status quo pending legislation or executive action, or the reserving of land dedicated to a specific public purpose. *See* Wheatley, Withdrawals and Reservations of Public Domain Lands (NTIS: PB 187002 (1969)).

27. 49 U.S.C. § 1671-84 (1968).

28. 49 C.F.R. § 195.210 (1969).

29. Before 1953, many state regulations were applied by the Dept. of Interior on the OCS to promote harmony between operations in the state and on the OCS and to supplement the then-meager body of federal regulations. Until recently the key group advancing state input was the OCS Research Management Advisory Board which was concerned mainly with technological, not policy, matters. The OCS Lands Act incorporated many then-existing state laws. State laws setting production limits remained in effect until 1970 when President Nixon withdrew OCS lands from state control. KASH & WHITE 103 (1973).

30. *E.g.*, Louisiana Wildlife & Fisheries Comm'n, Louisiana Land Office, Louisiana Dept. of Public Works, Louisiana Deep Draft Harbor & Terminal Authority, Atchafalaya Basin Comm'n, Louisiana Mineral Bd., Louisiana Dept. of Conservation.

ment of pipelines.[31] Economic factors generally dictate the shortest route possible.[32]

The Louisiana Wildlife and Fisheries Commission, the only Louisiana state agency which has considerable influence over proposed pipeline routes, acquires that influence by virtue of the Fish and Wildlife Coordination Act of 1934.[33] The Commissioner has used power to change routes when those planned would have traversed oyster leases, hunting preserves, game management areas, or wildlife sanctuaries.[34] The Louisiana Deep Draft Harbor and Terminal Authority, a special-function agency regulating deepwater ports, exercises control over pipeline "tie-in" issues.[35] Additionally, new regulations from the Louisiana Archeological Survey and Antiquities Commission protect cultural and historical resources from indiscriminate excavation and digging.[36] The Louisiana Department of Public Works determines the criteria for the laying of pipelines below waterbottoms[37] while the State Land Office grants approval to pipelines going over state lands, but only after approval from other interested state agencies has

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31. Interview by Linda Watkins, Research Assistant for LSU Sea Grant Legal Program, with Ory Poret, Assistant Register of State Lands, in Baton Rouge, La., Dec. 11, 1975.

32. Offshore pipelines may be as large as three feet in diameter and cost as much as $475,000 per mile. The cost of the pipeline may vary depending upon the method employed to lay the pipe, the depth of the water, the life expectancy of the pipe, etc. KASH & WHITE 87-89 (1973). The width of the right-of-way needed may also vary. *See, e.g.*, Department of the Army, New Orleans District, Corps of Engineers, Public Notices of Feb. 6, 1976, Feb. 5, 1976, Jan. 30, 1976, Jan. 28, 1976, Jan. 26, 1976, and Jan. 21, 1976.

33. 16 U.S.C. §§ 662-63 (1934): "[W]henever the waters of any stream or other body of water are proposed to be . . . controlled or modified for any purpose whatever . . . , by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency shall first consult with the United States Fish and Wildlife Service, Department of the Interior and with the head of the agency exercising administration over the wildlife resources of the particular state . . . ."

34. Interview by David Duhon, Research Assistant for the LSU Sea Grant Legal Program with Donald Bonnecarrere, Adm'r of Pipelines, Louisiana Dept. of Conservation, Baton Rouge, La. on January 7, 1976.

35. LA. R.S. 34:3101 (1972); *see also* Environmental Protection Plan of the Louisiana Deep Draft Harbor & Terminal Authority promulgated Jan. 26, 1974, on file in the Office of the Secretary of State, State of Louisiana.

36. 1 La. Reg. 375-86 (1976). For Corps of Engineers regulations to protect cultural resources, see 40 Fed. Reg. 51199-200 (1975).

37. The Department's primary concerns are that the pipelines do not

been secured.[38] However, this approval does not bar suit by the state against a lessee who subsequently causes environmental damage to the leased property.[39]

The Atchafalaya Basin Commission, which regulates the enormous wildlife area of the Atchafalaya River Basin, has enacted additional guidelines for pipeline construction within its jurisdiction. Most of these regulations concern the maintenance of the original condition of the area, the preservation of its beauty, and the avoidance of pollution.[40]

LOCAL AND PRIVATE REGULATION

Local governing bodies may enact regulations which affect placement of pipelines and any facilities which may accompany them, *e.g.*, pumping stations. Two parishes in Louisiana's coastal zone, Jefferson and Plaquemines, have parish-wide zoning.[41] A third, Terrebonne, has passed an ordinance which covers the construction, installation and operation of gas or liquid petroleum pipelines in the parish and further provides for standards of construction, reports, permits, insurance, fees, and penalties for violations.[42] The ordi-

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block navigation and that the lines are laid at a safe level so as to avoid rupture from anchoring or similar causes. Interview by David Duhon, Research Assistant for LSU Sea Grant Legal Program, with Harry Periou, Assistant Engineer, Dept. of Public Works, in Baton Rouge, La., Jan. 8, 1976.

38. Interviewed by David Duhon, Research Assistant for LSU Sea Grant Legal Program, with Ory Poret, Assistant Register of State Lands, in Baton Rouge, La., Jan. 9, 1976.

39. The following clause is included in all right-of-way agreements over state-owned lands: "The granting of this right-of-way shall not be a bar or defense to the right of the State of Louisiana and its agencies, boards and commissions to take any and all action necessary to seek abatement of construction or operations that unreasonably or unlawfully interfere with or disturb the existing ecological regimen, including, but not limited to the fishing, hunting, trapping and oyster industries, and to take action for any and all damage to the existing ecological regimen which does not result from a reasonable exercise of the rights herein granted." Copy on file in the offices of the LOUISIANA LAW REVIEW.

40. Adopted April 8, 1975, in compliance with Act 365 of the 1974 La. Regular Legislative Session. Copy on file in the offices of the LOUISIANA LAW REVIEW.

41. Local and regional zoning is authorized in two sections of LA. CONST. art. 6, §§ 17, 20. The legislature must establish "uniform procedures," LA. CONST. art. 6, § 17, unless authority for land use control and zoning had been previously authorized under the Constitution of 1921.

42. Terrebonne Parish Police Jury Ordinance No. 1783 (1974). Copy on file in the offices of the LOUISIANA LAW REVIEW.

nance specifically requires that the owner of the pipeline shall relocate it at his own expense if it interferes with the construction of any public works or parish improvements.

Contractual bargaining, rather than police power, is the source of pipeline regulation at a very basic level, the landowner's lease to the pipeline company. In addition to construction restrictions aimed at avoiding erosion or changes in waterflow patterns, several major landowners require pipeline routes which avoid areas of high biological productivity if at all possible.[43]

JUDICIAL ACCOMMODATION OF COMMERCIAL AND LOCAL INTERESTS

Courts consistently have recognized the power of local government to regulate matters of intense local concern within the limits established by the supremacy clause and the doctrine of federal preemption.[44] In the promotion of the general welfare municipalities have been allowed to regulate city growth, enforce local safety standards, and act to preserve the beauty of the community.[45]

However, local communities consistently have encountered difficulties when attempting to regulate pipelines. The judiciary hesitates to clearly delineate the limits of local power in this area. For example, in *United Gas Pipeline Company v. Terrebonne Parish Police Jury*[46] the Fifth Circuit ruled

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43. As far back as the 1930's the Louisiana Land and Exploration Company stipulated in their leases that pipelines should attempt to follow the route of least possible damage to the property. For excerpts from recent oil and gas leases, see La. Advisory Commission on Coastal & Marine Resources, Official Journal, Part 2, Appendix to Item 53 (1972).

44. *E.g.*, Panhandle Eastern Pipeline Co. v. Public Service Comm'n, 332 U.S. 507, 523-24 (1947).

45. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (1975), *cert. denied*, 96 S. Ct. 1148 (1976). Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 344 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

46. 445 F.2d 301 (5th Cir. 1971) (*per curiam*) (The ordinance struck down here is quite similar to the previously mentioned Terrebonne ordinance now in effect.). *See also* United Gas Pipeline Co. v. Lafourche Parish Police Jury, 338 F. Supp. 1296 (E.D. La. 1972) (Louisiana drainage district could not exercise its levee appropriation power to compel a pipeline company to relocate lines at its own expense, although company's servitude had a riparian

that "the parish could not require, as a condition to the issuance of a construction permit to construct, maintain and operate an interstate gas transmission pipeline under a public road within the Parish, that the gas company pay cost of relocating, altering or removing pipelines . . . outside of the highway or road right-of-way."[47] Although basing its holding on the conflict between the local ordinance and the Natural Gas Pipeline Safety Act of 1968, the court indicated that the parish could require permits based upon reasonable conditions, but provided no criteria by which to determine the reasonableness of questioned conditions.

State pipeline regulation has fared little better than the local attempts. One exemption, however, appears in cases arising under the Natural Gas Pipeline Safety Act. In *Tenneco Inc. v. Public Service Commission of West Virginia,*[48] the plaintiff pipeline company objected to a state tax imposed to cover the cost of administering a pipeline safety program. Finding that the act actually encouraged state participation and therefore was not preemptive, the district court held that the state act in no way conflicted with the federal statute and therefore was enforceable. The approach is consistent with that used in the *Terrebonne* case since the presence or lack of conflict with federal regulation determined the validity of the state's efforts.

Similarly, the leading case of *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*[49] held that the Natural Gas Act[50] did not preempt state legislative jurisdiction over the subject matter it regulates. The United States Supreme Court read the Act to be a comprehensive regulatory scheme created by the federal government, but supplementary in its operation to those of the states and "in no manner usurping their authority."[51] The Court charac-

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character (proposing to construct a reservoir canal adjacent to a bayou), because the overall purpose of the proposed canal was for land reclamation instead of flood control).

47. 445 F.2d at 301.

48. 352 F. Supp. 713 (S.D. W.Va. 1973) (affirmed by Fourth Circuit because of no "unmistakable Congressional intention to bar states from assessing pipelines to pay . . . the state's expenses . . ."). 489 F.2d 338 (4th Cir. 1973), *cert. denied,* 417 U.S. 946 (1974).

49. 332 U.S. 507 (1947).

50. 15 U.S.C. §§ 717a-717w (1938).

51. *Id.* at 520.

terized the scheme as one of "cooperation between federal and state agencies"[52] and as having "no effect or purpose to cut down state power."[53]

Despite such strong approval of state participation, subsequent decisions proceeded consistently to condemn, or to condone the condemnation of, other state regulations based upon an alleged lack of a local interest sufficient to justify the interference with the passage of natural gas in interstate commerce. When a municipality attempted to stop the construction of a pipeline pursuant to its police power, its pleas of potential peril to the health, safety, and welfare of its residents were rejected readily.[54] The court refused to consider the merits of alternative routes, declaring that the municipality had failed to prove that the pipeline was a sufficient hazard.

The court in *Gulf Interstate Gas Co. v. Rapides Parish Police Jury*[55] invalidated a set of parish ordinances. Though branding the regulations unconstitutional, the federal district judge followed the *Panhandle* approach in rejecting claims of preemption. Rather, he found the local regulations capricious, unreasonable and arbitrary, since they required pipelines to be laid at a depth technologically impossible at the time.

Another local ordinance, attempting to prevent the construction of a pumping station to regulate an existing federally authorized pipeline, was found to be an undue burden on interstate commerce in *New York State Natural Gas Corp. v. Town of Elina.*[56] The court said the town could not have prevented the construction of the pipeline, so it could not prevent the construction of a station merely ancillary to the pipeline. Despite this ruling, the court affirmed the validity of local police power in the field:

> There is an indisputable local interest in controlling the environmental development of the community which is almost universally expressed in the power of local municipalities to enact zoning ordinances. It does not ap-

52. *Id.*

53. *Id.* at 517.

54. Transcontinental Gas Pipeline Corp. v. Borough of Milltown, 93 F. Supp. 287 (D.N.J. 1950).

55. 115 F. Supp. 746 (W.D. La. 1953).

56. 182 F. Supp. 1 (W.D.N.Y. 1960).

pear to have been the intention of Congress in enacting the Natural Gas Act to exempt gas suppliers from complying with such local zoning ordinances. Nor does the Commerce Clause of the Constitution operate to exempt interstate commerce from reasonable local zoning regulations. Only if it is established that a particular site is reasonably necessary for the proposed construction of equipment and buildings ancillary to an interstate pipe system should a local zoning ordinance forbidding such construction on that particular site be struck down.[57]

These cases seem to subordinate the local interest in the siting of lines, asserting at the same time the propriety of local regulation in the area. However, as will be seen, applications of new theories of constitutional construction and local police power may reverse this trend.

A NARROWER VIEW OF PREEMPTION

Generally state or local governments may exercise the legislative jurisdiction derived from their police powers unless a federal statute is deemed to preempt state action or the supremacy clause is invoked to invalidate a state action. The two principles are distinct, but the distinction often has been blurred. Courts traditionally have said that preemption occurs when Congress has shown an intent to occupy a field,[58] or when the subject is one which requires national uniformity.[59] Accordingly, state actions will be struck down more often because they infringe upon an area of regulation deemed preempted by the federal government than because of any immediate conflict between federal and state actions. Preemption arguments have also been used, however, to strike down state laws that conflict with federal laws.[60]

Professor Harrap Freeman has argued recently that court interpretation of the Constitution is a better vehicle for resolving federal and state conflicts than is use of Congressional intent to determine if federal law has preempted state

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57. *Id.* at 6.

58. Cooley v. Board of Wardens, 53 U.S. (12 How.) 298, 319-20 (1851).

59. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

60. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971); Chicago v. Atchinson T. & S. F. Ry., 357 U.S. 77 (1958); *but see* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

action.[61] Preemption, he argues, stems from two sources, neither of which is based on Congressional intent. The first is Constitutional preemption:[62] numerous clauses and articles of the U.S. Constitution forbid state action, although state action is permissible in some cases with the consent of Congress.[63] Here, preemption arises because of the words of the Constitution, not the words of Congress.

A second, and more nebulous, ground for finding preemption arises out of the nature of the matter regulated, Freeman argues. The fields of foreign affairs and national security always have been treated as areas of exclusively federal concern.[64] Justification for the preclusion of state regulation in these and other matters of national concern rests not upon Congressional intent to "occupy the field," but rather upon the necessity of the national government's exercising sole control over these activities. Finding preemption on this basis properly forces the Supreme Court, not the Congress, to set the boundaries in federal and state jurisdictional disputes. According to Freeman, Hamilton envisioned such a role for the court when he wrote in *The Federalist No. 39:*

> It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution. . . .[65]

Constitutional preemption, if properly applied, should bar state legislation in few areas. Most activities fall into the area of concurrent federal-state regulatory power in which the supremacy clause should govern jurisdictional disputes. In Freeman's view, the supremacy clause is not a tool to be used

61. H. Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL LAW REV. 630 (1972) [hereinafter cited as Freeman]. *But see* W. Bratton, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975). *See generally* Endahl, *Preemptive Capability of Federal Power*, 45 U. COL. L. REV. 51 (1973); Comment, *A Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. PUB. L. 391 (1973); Note, 50 IND. L.J. 848 (1975).

62. *E.g.*, U.S. CONST. art. I, § 10.

63. *E.g.*, *id.* §§ 4, 10.

64. *See*, Annot., 11 A.L.R. 987-88 (1921); Annot., 137 A.L.R. 1488-90 (1942).

65. The Federalist No. 39 at 245-46, Mentor Book ed., 1961 (James Madison).

to preempt fields of legislation, but rather a precise instrument to be used solely to strike *individual* state statutes which *conflict* with those of the federal government. Absent conflict with existing federal law, the states should remain free to legislate or regulate.

Several recent United States Supreme Court decisions reflect this narrower view of preemption. In *Goldstein v. California*[66] a state's prohibition of phonograph record piracy survived assertions that the copyright clause preempted the area. The Court, in a 5-4 decision, upheld the state statute as not "absolutely and totally contradictory and repugnant"[67] to the federal scheme, thus marking the re-emergence of a long-dormant presumption in favor of the validity of state legislation.

New York State Department of Social Services v. Dublino[68] followed *Goldstein* in rejecting challenges based on preemption. In upholding New York's supplemental conditions upon the receipt by its residents of federal Aid to Families with Dependent Children assistance, the Court relied largely on the principle of cooperative federalism embodied in the federal act.[69] Although the *Dublino* holding may be correct, one may view the grounds relied upon, *i.e.*, the absence of a specific intent by Congress to occupy the field, as a retreat from the requirements of "absolute and total repugnance" expressed in *Goldstein.*[70] Freeman would argue that a stricter approach to preemption would use Congressional intent merely as one factor in evaluating the applicability of the preemption doctrine to the subject matter.

Kewanee Oil Co. v. Bicron Corp.[71] presented the question whether federal patent law preempted a state patent statute. The Court, looking to the differing objectives of the federal and state legislation, found neither conflict nor preemption of state regulation. Even an admitted conflict survived judicial review in *Merrill, Lynch, Pierce, Fenner, and Smith, Inc. v. Ware.*[72] A forfeiture of benefits under a non-contributory

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66. 412 U.S. 546 (1973).

67. *Id.* at 553.

68. 413 U.S. 405 (1973).

69. 413 U.S. at 421. "Where coordinate state and federal efforts exist within a complementary framework, and for the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." *Id.*

70. 413 U.S. at 413-17.

71. 416 U.S. 470 (1974).

72. 414 U.S. 117 (1973).

profit sharing plan was subject to arbitration under a rule enacted pursuant to the Securities and Exchange Act of 1934,[73] but absolutely void under the challenged California statute. Holding that state law should be preempted "only to the extent necessary to protect the achievement of the aims of the Securities and Exchange Act,"[74] the Court went on to define those aims as fair dealing and investor protection, neither of which was hampered by the California regulation.

Lower courts have followed the trend of the Supreme Court and have recently favored state interests in several state-federal conflicts, particularly in the environmental area. In *California v. EPA*[75] and *State of Minnesota v. Callaway*,[76] federal agencies were required to comply with substantive and procedural aspects of state programs under provisions of the Federal Water Pollution Control Act.[77] Further, *Brown v. EPA*[78] and *District of Columbia v. Train*[79] held that the Environmental Protection Agency is powerless to force states to administer the agency's federal transportation controls authorized by the Clean Air Act.[80] The court in *Brown* reasoned that the act was passed under the commerce power of the U.S. Constitution which did not permit forcing states to invoke their powers against their subdivisions; such efforts infringed upon the states' basic sovereign powers. It would be a departure from previous constitutional practice[81] and repugnant to the notion of federalism embodied in the Constitution, said the court, to allow Congress to direct states to regulate any economic activity that affects interstate commerce in any manner that Congress sees fit.

REMEDIES

The recent jurisprudence from both the Supreme Court and the lower federal courts can provide guidance for local lawmakers concerned with pipeline placement. Clearly pipe-

73. 15 U.S.C. §§ 79a-78hh(1) (Supp. 1975).
74. 414 U.S. at 137.
75. 511 F.2d 963 (9th Cir. 1975).
76. 401 F. Supp. 524 (D. Minn. 1975).
77. 32 U.S.C. §§ 1251-1376 (Supp. 1972).
78. 521 F.2d 827 (9th Cir. 1975).
79. 521 F.2d 971 (D.C. Cir. 1975).
80. 42 U.S.C. § 1857 (Supp. 1969).
81. 521 F.2d at 839.

line regulation by states is not preempted expressly by the Constitution, nor is the regulation of pipelines or pipeline safety a matter which, by its nature, is best regulated on the federal level. A long and unbroken line of judicial interpretation of the Natural Gas Act and the Natural Gas Pipeline Safety Act indicate that state action is not automatically barred.[82] If not an area preempted, pipeline site selection is presumably an area of concurrent jurisdiction. The local lawmakers' main concern should be avoiding applications of the local law which would conflict directly with the application of federal law on the same issue.

Options are available to state and local governments wishing to influence pipeline placement.[83] In Louisiana, Terrebonne Parish has adopted a special purpose ordinance to deal with the problem.[84] Other parishes have parish-wide zoning authority which provides a means to control siting of pipelines. Since pipelines often cross the boundaries of many subunits of government, a regional or multi-parish (county) plan, however, may be superior to a single parish or municipal plan. Uniform regulations for a region arguably place a smaller burden on interstate commerce, an issue often raised in pipeline litigation.[85] Conceivably a uniform regional plan could better solve the technical problems arising from pipeline regulation.[86] A region can decide affirmatively which

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82. *See* Panhandle Eastern Pipeline Co. v. Public Service Comm'n, 332 U.S. 507 (1947); Tenneco, Inc. v. Public Service Comm'n, 489 F.2d 388 (4th Cir. 1973), *cert. denied*, 417 U.S. 946 (1974); United Gas Pipe Line Co. v. Terrebonne Parish Police Jury, 445 F.2d 301 (5th Cir. 1971) (*per curiam*); New York State Natural Gas Corp. v. Town of Elina, 182 F. Supp. 1 (W.D.N.Y. 1960); Gulf Interstate Gas Co. v. Rapides Parish Police Jury, 115 F. Supp. 746 (W.D. La. 1953); Transcontinental Gas Pipeline Corp. v. Borough of Milltown, 93 F. Supp. 287 (D.N.J. 1950).

83. In addition to legislation, local input may be achieved by using administrative remedies granted by federal agencies. In the area of pipelines, new OCS regulations from the Department of Interior increase state review powers over new development plans and modifications of previously approved developments. 30 C.F.R. § 250.34 (1976).

84. See discussion in text at note 42, *supra*.

85. *Cf.* Duffcon Concrete Prod. v. Borough of Cresskill, 64 A.2d 347 (N.J. 1949); Annot., 27 A.L.R. 3d 1022 (1969) and Annot., 36 A.L.R. 2d 653 (1954); Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

86. Among these problems might be the development of pipeline corridors, if appropriate, the multiple use of facilities, and the monitoring of and

areas are most suitable for pipeline corridors, as opposed to a less convincing *ad hoc* decision barring construction without providing alternative sites.

Coastal zone management programs provide one means for coastal areas to develop such a pipeline management plan. The federal Coastal Zone Management Act[87] allows the development of comprehensive land and water use management programs in coastal areas. State and local governments may choose the particular problems and needs which their program will address. To be approved under the Act, and thereby gain financial aid and other benefits, such a plan must consider national interests in the siting of facilities which serve a greater than local interest. Hence, in Louisiana, a pipeline management subelement of a coastal management program could deal with pipeline sitings so long as national interests are considered.

The consistency provisions requiring federal actions in the coastal zone of a state to conform[88] to the maximum extent practicable with an approved coastal zone management plan increase the desirability of using the Coastal Zone Management Act.[89] The clause provides state and local government a useful tool for resolving problems which arise when attempting to accommodate federal and local interests and perhaps affords an effective way to head off clashes between federal and local law over pipeline sitings. Those actions explicitly required to be consistent with approved state coastal management programs include: 1.) projects directly affecting the coastal zone, 2.) projects within the coastal zone, 3.) activities requiring a federal permit or license, and 4.) state or local government activities for which federal assistance is requested.[90] In the first two instances the federal activities must be consistent, "to the maximum extent practicable,"[91]

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inspection, for safety purposes, of abandonment or perpetual maintenance procedures, and others.

87. Coastal Zone Management Act of 1972, 16 U.S.C. § 1451-64 (Supp. 1972).

88. See discussion in text at note 91, *infra*.

89. *See* Brewer, *Federal Consistency and State Expectations*, COASTAL ZONE MGMT J., Vol. 2, No. 4 (1976); Hershman & Folkenroth, *Coastal Zone Management and Intergovernmental Coordination*, 54 OREGON L. REV. 13 (1975); Hershman, *Achieving Federal-State Coordination in Coastal Resources Management*, 16 WM. & MARY L. REV. 747 (1975).

90. 16 U.S.C. § 1456 (Supp. 1972).

91. *Id.*

with the state management program. In the latter two, the federal government cannot give the required permit or license or distribute federal financial assistance unless the project is approved under the state coastal management program. The federal agency cannot furnish a permit, license or grant to an applicant without the concurrence of the state coastal agency unless the Secretary of Commerce finds that the proposed activity is consistent with the objectives of the Act or "otherwise necessary in the interest of the national security."[92] If the federal agency decides to issue a permit which a state did not approve, the state-federal issue most likely will be decided by traditional processes of constitutional adjudication, with federal supremacy and preemption as important considerations.

CONCLUSION

State and local legislative action will not create any new rights for local governments attempting to regulate pipeline sitings when confronted with conflicting desires of industry or federal regulations, but will simply make existing rights easier to assert and defend. The final arbiter of any dispute will be the Constitution as interpreted by the courts. As argued above, steps can be taken to aid local interests. Since preemption generally should not bar state initiatives, local lawmakers should strive to avoid conflict with federal regulations with respect to particular siting issues. A nonconflicting application of a local statute, coupled with the recent court decisions protecting state and local interests, provide a strong position for advocates of more local control. A critical factor, however, is the necessity for active regulation; assertions of genuine local interest in siting decisions are much more credible when backed up by positive legislation, rather than the mere assertion of a veto right.

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92. *Id.*